SUPREME COURT OF THE UNITED STATES

October Term, ~~1949~~ 1950 1951

No. ~~454~~ 74

GEORGIA RAILROAD & BANKING CO.....Appellant,

vs.

CHARLES D. REDWINE,
STATE REVENUE COMMISSIONER.....Appellee

APPEAL FROM THE DISTRICT COURT OF THE NORTHERN DISTRICT OF GEORGIA

INTERVENTION AMICI CURIAE

Victor Davidson, Irwinton, Ga.
Special Attorney for Intervenors.

MORGAN COUNTY
OGLETHORPE COUNTY
GREENE COUNTY
CITY OF GREENSBORO
CITY OF UNION POINT
Jos. G. Faust, Attorney, Greensboro, Ga.
WARREN COUNTY
Joe H. Terrell, County Attorney, Warrenton, Ga.
CLARKE COUNTY
Carlisle Cobb, County Attorney, Athens, Ga.
McDUFFIE COUNTY
J. Glenn Stovall, County Attorney, Thomson, Ga.
NEWTON COUNTY
C. C. King, County Attorney, Covington, Ga.
FULTON COUNTY
Standish Thompson, Attorney, Atlanta, Ga.
ROCKDALE COUNTY
J. H. McCalla, Dempsey W. Leach, Attorneys, Conyers, Ga.
WALTON COUNTY
Roberts and Roberts, Attorneys, Monroe, Ga.
DeKALB COUNTY
Julius A. McCurdy, County Attorney, Decatur, Ga.

BURKE COUNTY
E. M. Price, County Attorney, Waynesboro, Ga.
CITY OF MADISON
TOWN OF RUTLEDGE
A. F. Jenkins, Attorney, Madison, Georgia
TALIAFERRO COUNTY
Osgood O. Williams, County Attorney, Crawfordville, Ga.
COLUMBIA COUNTY
J. F. Hardin, County Attorney, Augusta, Ga.
TALBOT COUNTY
J. A. Smith, Attorney, Atlanta, Georgia
TAYLOR COUNTY
CITY OF REYNOLDS
CITY OF BUTLER
J. R. Lunsford, Attorney, Butler, Georgia
PEACH COUNTY
PEACH COUNTY BOARD OF EDUCATION
CRAWFORD COUNTY
Sam M. Matthews, Attorney, Fort Valley, Ga.

# SUBJECT INDEX

# TABLE OF CASES CITED

## CONSTITUTIONS AND STATUTES CITED



## TEXTS AND DIGESTS CITED

IN THE SUPREME COURT OF THE UNITED STATES

GEORGIA RAILROAD & BANKING CO.,
Appellant

vs.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER,
Appellee

No. 454

October Term, 1949

# INTERVENTION AMICI CURIAE

This case is of such importance that the Counties and municipalities desire leave to intervene amici curiae, and file briefs.

There are three railroad corporations in Georgia which have been receiving tax exemption for more than one hundred years, to-wit: the Georgia Railroad and Banking Company, the Augusta and Savannah, and the Southwestern. Some portion of one or more of these three railroads lies in twenty-nine different counties of the State of Georgia whose population aggregate approximately one-half the population of the State. The Augusta and Savannah having consolidated with the Central of Georgia had its property returned for taxation for the first time in 1949.

These counties and municipalities are vitally interested in the outcome of this decision inasmuch as this decision affects the claims for taxes not only against the present plaintiff but against the other railroad which claims similar tax exemptions.

The case is most important because, should this Court hold that the judgment against Wright is binding on the present State Revenue Commissioner and the State of Georgia, it will preclude the State, the Counties, the school districts, and the municipalities forever from *attempting* to tax this railroad as well as bar them from *attempting* to collect taxes from the Southwestern Railroad.

In all probability, there have been more cases decided by the Supreme Court of the U. S. relative to the tax exemption clause in the charter of the Georgia Railroad and Banking Company than that of any other corporation. Yet all of these with the exception of one were cases against officials of the State in an individual capacity, and hence, the State not being a party thereto, or present in court could not have its rights determined and was not bound by the decisions. The one case in which the State was a party was that of *Atlantic Coast Line Railroad* v. *Phillips*, 332 U. S. 168, 91 L. E. 1977. Should the judgment of the court below be sustained, it is probable that other cases will be for determination as to the rights of taxation by Intervenors Amici Curiae, unless the decision in this case should definitely determine that the Company has no right to any tax exemption.

Intervenors Amici Curiae desire that they be allowed to provide the equal protection of the laws as guaranteed by the 14th Amendment to all their citizens by taxing this railroad in the same manner all other taxpayers are taxed. In order that the rights of taxation may be definitely fixed, Intervenors respectfully pray the United States Supreme Court to review the grounds set forth in the original and amended motion to dismiss the petition of plaintiff in the court below and order that it be dismissed not merely on the ground given by the court below but also on each of the following grounds, in

order that future litigation will be unnecessary to determine the validity of these grounds:

1. The present action and also the action in which the judgment was rendered now sought to be enforced were each a suit against the State of Georgia to which the State has not given its consent to be sued.

2. The case of *Musgrove* v. *Georgia Railroad and Banking Co.*, 204 Ga. 139, is res judicata as to all issues involved in the present case.

3. The exemption pleaded denies all the people of Georgia the equal protection of the law guaranteed by the 14th Amendment, and the people had the right to adopt the Constitution of 1945 repealing all such exemptions.

4. Even though a valid tax exemption had been provided by the charter of this Corporation, the Corporation violated its contract by failing to construct the railroads specified by the charter and hence forfeited any exemption.

5. The exemption granted to Georgia Railroad Co. in 1833 was not granted to the Georgia Railroad & Banking Co. by the charter of 1835.

6. One of the branches of the railroad, 67 miles long from Madison to Atlanta, has never had charter exemption at all.

7. Georgia has provided ample remedies at law in her own courts in which appellant can test any claim to tax exemption.

*Historical Account of the Present Litigation*

In 1904, the Georgia Railroad and Banking Company brought its action against W. A. Wright, Comptroller-General of Georgia, praying the judgment sought to be enforced by the present action. No plea was filed by the defendant on the grounds that it was an action against the State, and judg-

ment was rendered against Wright. In 1945, the Georgia Railroad and Banking Company filed an almost identical suit in the Superior Court of Fulton County, Georgia, pleading the above action as res judicata and judgment and praying judgment similar to that in the above case. This time the action was against M. E. Thompson, State Revenue Commissioner, and successor in duties to the Comptroller General insofar as taxes were concerned. This time the defendant pleaded that it was an action against the State to which the State has not given its consent. The Supreme Court of Georgia sustained this contention and so held it not maintainable. *Musgrove* v. *Georgia Railroad and Banking Company*, 204 Ga. 139. On appeal to the United States Supreme Court, on motion of Appellant the present Appellee, Charles D. Redwine, was substituted as Appellee, and then the appeal was dismissed. *Georgia Railroad and Banking Company* v. *Musgrove* 335 U. S. 900.

Upon dismissal of the last action, thus affirming the decision of the Supreme Court of Georgia, Appellant filed the present action in the District Court for the Northern District of Georgia. Appellee pleaded that it was an action against the State, as well as the action against Wright in 1904 described above was one against the State and that the State had not consented in either case to the suit, and further pleaded that the decision of the Georgia Supreme Court of *Musgrove* v. *Georgia Railroad and Banking Company* was res judicata as to the present action. The three-judge court sustained motion of defendant and dismissed the action.

*No Consent by the State of Georgia to Be Sued*

The theory upon which the present action is brought is that the judgment in the case brought by Georgia Railroad and Banking Company against W. A. Wright, Comptroller-General of Georgia in 1904, is now in the present case sought to

be enforced, was rendered in an action against the State of Georgia to which the State had consented to be sued, basing the action upon the case of *Gunter* v. *Atlantic Coast Line Railroad Co.*, 200 U. S. 273, 50 L. E. 477.

That action was based on a judgment in the Pegues case wherein the state had consented to be sued. There had been no intervening or supervening decisions changing the law, no changes in conditions, no changes in the Constitution revoking any exemptions, no breach of contract on the part of the plaintiff, nor any other new issues, such as we have in the present case.

In all the cases cited by counsel in the Federal courts, so far as we have been able to find, wherein a judgment had been rendered previously against a State officer and later an acton was brought to enforce that judgment and the Court overruled the defense that the second action was against the State, it appeared either that the laws of the State authorized the suit in the first instance or that there was no method provided by the laws of the State by which the plaintiff could litigate with the State in any court over the issues involved.

## THE WRIGHT CASE

Opposing counsel insist that the Wright Case was one in which this state consented to be sued and give as one of his reasons for so thinking, the message of Governor Hoke Smith to the legislature of Georgia in June of 1908, almost a year after the judgment had been rendered by Judge Newnan. It will be remembered that the pleadings in this case were filed during the first part of 1904 when a different Governor was in office and Governor Smith did not take office until 1908.

Counsel give as another reason for so thinking, is that the laws of Georgia authorized the Comptroller General to command the services of the Attorney General in the collection

of taxes. It will be noted that this is still the law except that all the powers of the Comptroller General relative to such are conferred upon the State Revenue Commissioner, yet the Supreme Court in the Musgrove decision, supra, as well as in many others, have held that such cases are against the State.

*Wright had no authority to bind the State by asking a Declaratory Judgment*

The question was argued in the courts below as to whether the Comptroller General in entering the litigation in the Wright case and praying for a declaratory judgment relative to the tax exemption in question, was an act of the State and in so doing that the judgment bound the State.

We might first observe at that time there was no provision in either the State laws or the Federal statutes authorizing declaratory judgments.

In the case of Southern Railway Co. vs. State, 116 Ga. 276.(2) decided in 1902, the State brought an action against the Southern Ry. Co. in which it prayed "that the rights and equities of the parties in and to the subject matter be ascertained, determined and declared and be established and enforced by proper orders and decrees of the court; that it be decreed that the defendant has no right to the use of the disputed premises . . ."

The court dismissed the action because a declaratory judgment is not maintainable in this state.

If the Comptroller General was not authorized to ask for declaratory judgments in the State courts neither would he be in the Federal courts.

From the foregoing it is apparent that the laws of Georgia made no provision for the Comptroller General entering into litigation asking a declaratory judgment such as is evident

Wm. A. Wright did. As Comptroller General he had only the powers granted him by law. If he exceeded these powers, he was acting in an individual capacity and whatever judgment may have been rendered the State was not affected.

Section 268 of the Code of 1895. "Powers of public officers are defined by law, and all persons must take notice thereof. The public cannot be estopped by the acts of any officer done in the exercise of a power not conferred."

The General Assembly in the act of 1902 had declared the franchises of railroads taxable. It was the duty of the Comptroller General to enforce this law by issuing tax executions and litigating in the manner provided by the laws of Georgia at that time. When the injunction was entered in the Federal Courts it was his duty to call in the services of Attorney General and ask that it be dismissed as an action against the State, and that plaintiff be required to litigate in the courts provided by law. He had no more authority to engage in this litigation as an official and ask for a declaratory judgment than he would have had in the State courts.

*The Governor had no power over this case*

Code of 1895. "Section 23. When any suit is instituted against the State, or against any person, in the result of which the State has an interest, under pretense of any claim inconsistent with its sovereignty, jurisdiction or rights, the Governor shall, in his discretion, provide for the defense of such suit, unless otherwise specially provided for."

We urge that the Governor had no power to require the Attorney General to ask for a declaratory judgment in this case because the suits referred to therein were such as were authorized by the legislature to proceed against the State.

Code section 102-109 provides that the State shall not be bound by the passage of any law unless named therein, and

in the case of Lingo vs. Harris 73 Ga. 28 the court held that doubts shall be resolved in favor of the public.

As to whether the Wright case was one against Wright in his official capacity, the distinction is drawn in the case of Ramsey vs. Hamilton *as* Treasurer, William B. Harrison *as* Comptroller General, et al, 181 Ga. 365, which held that the word "as" showed it to be against the Comptroller General in his official capacity.

It will also be observed that in the recent case of Georgia Railroad and Bkg. Co. vs. Musgrove, in which Mr. Redwine was substituted as defendant in the U. S. Supreme Court, the action was originally filed against "M. E. Thompson as State Revenue Commissioner" and when demurrers were filed an amendment was made striking the word "as" and substituting the words "who is".

Chief Justice Taft, in his opinion in the case of *Gorham Manufacturing vs. Wendell*, 261 U. S. 1, 67 L. ed. 505, ex-505, expresses our contentions in this case so forcefully that we quote the following two extracts from his opinion:

> "A suit to enjoin a public officer from enforcing a statute, or to compel him to act by mandamus, is personal, and, in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office. . . .
>
> "It is in the shifting from the personal liability of the first officer, for threatened wrong or abuse of his office to the personal liability of his successor, when there is no privity between them, as there is not if the officer sued is injuring or is threatening to injure the complainant, without lawful official authority. There is no legal relation between the wrong committed or about to be committed by the one, and that by the other." (p. 506).

We quote from the headnotes in Kennecott Copper Corp. vs. State Tax Commissioner, 327 U. S. 57390 LE 862.

"2. Clear declaration of a state's consent to suit against itself in the Federal courts on fiscal claims is required, it being the right of a State to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances."

"3. Consent of the State of Utah to be sued for an occupation tax refund 'in any court of competent jurisdiction' may not be construed as a consent to be sued in a Federal Court."

See in this connection

Great Northern Life Insurance Co. vs. Read, Ins. Com. 322 U. S. 47, 88 L. E. 1121 and Ford Motor Co. vs. Dept. of Treasury of Indiana, 323 U. S. 459, 89 L. E. 389.

Both of these latter cases distinguishes the Gunter case from these because of the fact that in the Pegues case, upon which judgment the Gunter case was based the laws of South Carolina authorized the suit against the State.

*Plaintiff Prays a Declaratory Judgment*

If the present action be treated as a declaratory judgment proceedings, inasmuch as it is prayed that the Wright judgment be declared res judicata, we should consider whether jurisdiction has been granted by the statutes of Georgia or by the Federal statutes. The recent case decided in the Supreme Court of Georgia of Musgrove vs. Georgia Railroad and Banking Company, 204 GA. 139, held that the Georgia Courts had no jurisdiction to grant a declaratory judgment in this matter.

From Anderson on Declaratory Judgments, p. 119, we quote the following:

"Where the State's interests are drawn into question in a declaratory judgment action, the STATE MUST be made a party or represented pursuant to the law of the particular jurisdiction (italics supplied) . . ."

Section 28-1341 of the Federal Code as enacted in 1948 provides as follows:

"The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under the State law where a plain, speedy and efficient remedy may be had in the courts of the State."

In view of the fact that a judgment such as its prayed by plaintiff would have the same effect of suspending the assessment, levy or collection of taxes as if an injunction was granted, we think it was clearly the intention of Congress in enacting the above to prevent the district courts from interfering with States' rights in the construction of their tax statutes.

We quote from the case of *Great Lakes Dredge & Dock Co. vs. Huffman*, 319 U. S. 293, as follows:

> "It is in the public interest that Federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.
>
> "The scrupulous regard for the rightful independence of state governments which should at all times actuate the Federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted Federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and com-

plete, the aggrieved party is left to that remedy in the State courts, from which the cause may be brought to this Court for review if any Federal question is involved.' Matthews vs. Rogers, 284 U. S. at pages 525, 526, 52S Ct. at pages 219, 76 L.ed. 447.

"Interference with State internal economy and administration is inseparable from assaults in the Federal courts on the validity of State taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of State taxes. These are the considerations of moment which have persuaded Federal courts of equity to deny relief to the taxpayer—especially where the State, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax."

## THE LAW OF THE CASE

The plaintiff in attempting to enforce the judgment is bound by the law of the case in which the judgment was rendered. When the case was carried to the United States Supreme Court as reported in the 216 U. S. 420 that court reversed in part the judgment of the court below and held that the decision of the court in the State of Georgia vs. Georgia Railroad and Banking Company, 54 Ga. 423, is not res judicata. That decision as the law of the case is binding on plaintiff and should estop it from pleading in this action as set out in Paragraph 22 of the petition that the decision in the 54 Ga. is res judicata.

Again, the United States Supreme Court in its decision held that judgments as to taxes for one year is not res judicata as to taxes for other years. This rule, too, is the law of the case and plaintiff is bound thereby.

Under the foregoing law of the case, appellant has no case which it can lean on as res judicata.

We come into this case with two separate and distinct judgments sustaining our position in urging that judgments

heretofore rendered relative to the taxes for the Georgia Railroad & Banking Company are not res judicata as to years other than those on which the action was based. Both of these judgments were in cases in which the Georgia Railroad & Banking Company was plaintiff and the Comptroller General of the State of Georgia was the defendant, one of which judgments is the law of the present case.

First, in the *Georgia Railroad & Banking Company vs. Wright, Comptroller General*, 124 Ga. 596, counsel for plaintiff pleaded that judgments relative to taxes for one year were not res judicata as to taxes for other years. In that case, plaintiff took the same position which we are taking now, and the Supreme Court of Georgia ruled with plaintiff and so held.

Judge Candler in his opinion, pages 603 and 606, argues this question so effectively that we quote from it at length:

> "2. Counsel for the Georgia Railroad, however, contend that even if it is concluded by the judgment of the Supreme Court of the United States to its liability for the tax sought to be enjoined in the proceeding before the court, the estoppel of the judgment extends only to the question of the railroad's liability for the tax for the year 1900, and that it is not cut off from contesting the validity of the tax for all the other years in the present suit, from 1883 to 1904 inclusive. The question turns, of course, largely if not entirely upon whether suits for different taxes, or for taxes for different years, constitute different causes of action; for suits to enjoin the collection of taxes would necessarily be governed by the same principles.
>
> "In the case of Davenport vs. Chicago R. Co., 38 Ia. 633, 640, the Supreme Court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the tax for a subsequent year, each year's taxes constituting a distinct and separate cause of action. . . . It

could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision. *As a matter of public policy, and upon grounds of public necessity, we think the principle of res judicata ought not to be applied to questions of taxation where the State is exercising its sovereign power.*" (Emphasis supplied.)

Second, in 1904 when the Georgia Railroad & Banking Company filed its petition in the Federal Court and invoked the judgment which is now sought to be enforced, it took the opposite view and urged that judgments relative to taxes for one year are res judicata as to other years, pleading that the case of *State vs. Georgia Railroad & Banking Company*, 54 Ga. 423, was res judicata. The Supreme Court of the United States, on appeal, held that the foregoing case was not res judicata.

This judgment was rendered in 1910 after the Washington Branch had escaped taxation for 60 years. The United States Supreme Court, 216 U. S. 420, 30 Sup. Ct. 245, page 245, gives as its reason for refusing to treat the above case as res judicata as follows:

> "But in Georgia R. & Bkg. Co. vs. Wright, 124 Ga. 596, 53 S. E. 251, the Supreme Court of Georgia seems to have definitely decided that a judgment in a suit to collect a tax assessed for one year is not a bar to a suit for taxes subsequently assessed for another year, although the question decided in the first case is the same question upon which the second suit must also be decided.
>
> "This court, as is well settled, accords to a judgment of a state only that effect given to it by the court of the state in which it was rendered. Union & Planters' Bank vs. Memphis, 189 U. S. 71, 47 L. ed. 712, 23, Sup. Ct. Rep.; Covington vs. First Nat. Bank, 198 U. S. 100, 49 L.ed. 953, 25 Sup. Ct. Rep. 562. We shall therefore disregard this plea, and determine the matter upon its

merits, giving to the decision of the Georgia court consideration only as an authority."

In the face of the foregoing decision of the United States Supreme Court, plaintiff, in its present petition, again pleads that the decision in the 54th Georgia res judicata, and likewise that the Wright case is res judicata.

In support of our contention we cite the following authorities:

*Floyd & Lee vs. Boyd*, 16 *Ga. App.* 42 (3).

"3. A judgment can not be the basis of a plea of res judicata in an action in which the parties are not the same as in the case in which the judgment was rendered, although the cause of action be the same in both cases."

*Whitehead vs. Pitts*, 127 Ga. 774, 776.

" 'If one is made a defendant in an official capacity, the judgment will not bind him personally, and if made a defendant personally, it will not bind him officially.' "

## THE DOCTRINE OF RES JUDICATA, AS APPLIED TO TAXATION

Plaintiff insists that under the Georgia law, judgments relative to taxes for one year are res judicata as to taxes for future years, and cite as their authority the case of Coleman vs. Fields, 142 Ga. 205. At first glance, it would appear that this decision is important. However, as we analyze it, we find that it does not apply to the case at bar. In that case, the parties were the same and the State was not involved; the facts and the law were identical in the two cases, no new issues having been raised in the second case, no supervening decisions nor changes in the law, nor changes in conditions, nor breach of contract pleaded as in the present one.

A careful comparison of the ruling of the court therein with that of Commissioner of Internal Revenue vs. Sunnen, 333 U.

S. 591, 92 L. ed. 898 shows no great conflicts in the decisions of the Courts of Georgia and those of the United States Supreme Court. The Sunnen case is so sweeping in its decision that we will quote from it at length:

"But where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' . . . . . Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. . . .

"(6) These same concepts are applicable in the Federal income tax field. Income taxes are levied on an annual basis. *Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as those matters in the second proceeding which were actually presented and determined in the first suit. . . .*

"(7) . . . *A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such*

*determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. . . . Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.*

"(8, 9) *And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. . . . If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation.* . . . And where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive. . . . *As demonstrated by Blair vs. Commissioner*, 300 *U. S.* 5, 9, 57 *Ct.* 330, 331, 81 *L. ed.* 465, *a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable.* But the intervening decision need not necessarily be that of a state court, as it was in the Blair case. While such a state court decision may be considered as having changed the facts for federal tax litigation purposes, a modification or growth in legal principles as enunciated in intervening decisions of this Court may also effect a significant change in the situation. Tax inequality can result as readily from neglecting legal

> modulations by this Court as from disregarding factual changes wrought by state courts. In either event, the supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel. (Emphasis supplied) . . .

Assuming that the Wright judgment was in reality a judgment against the State, then and in that event had there been intervening and supervising decisions, change in the conditions, changes in the Constitution, the State could litigate any question not in issue in that case, Judge Newnan in his ruling states what these issues were:

". . . (1) Does the word 'stock,' as used in this taxing clause in the company's charter, refer to stock in the aggregate in the hands of the company (its capital stock), or does it refer to stock in the hands of the shareholders? (2) Is the decision of the Supreme Court of Georgia rendered in 1874 on the right to tax this corporation res judicata in this case? And (3) is this company subject to a tax on its franchise under the franchise tax act of the Legislature of Georgia of 1902 (Laws 1902, p. 37), in view of the taxing clause in its charter? Other minor questions are raised, but the foregoing are the main and important ones. . . ."

It will be noted that Judge Newnan based his decision largely on the decision of Judge McKay in the 54th Georgia, which was rendered at a time when the rule for the construction of tax exemptions was much broader than now.

The rule of construction of this tax exemption has now drastically changed. It is:

*The narrowest rational reading of the exemption.*

It will be noted that in the case of Atlantic Coast Line Railroad Co. vs. Phillips, State Revenue Commissioner, 332 U. S. 168, when it was on appeal to the United States Su-

preme Court, that court applied the latter rule to the section 15 now in question.

Should this rule be applied in this action the exemption would end.

## THE REDWINE CASE IN RES JUDICATA

We call attention to the recent case of Georgia Railroad and Banking Company vs. Charles D. Redwine, State Revenue Commissioner. (The case having been originally filed against Honorable M. E. Thompson, State Revenue Commissioner, later Honorable Glenn S. Phillips substituted as party defendant by consent, later Honorable Downing Musgrove substituted as party by consent and Honorable Charles D. Redwine substituted as party defendant in the United States Supreme Court without his consent.) This case was reported in 204 Ga. 139, as Musgrove vs. Georgia Railroad and Banking Company. We quote the following from the syllabus:

> "In the instant suit, brought by the company against the State Revenue Commissioner, it sought among other things to obtain a declaratory judgment decreeing that such charter provision constitutes a contract between the plaintiff and the State of Georgia, valid and binding upon the State and its officers in perpetuity, and prayed also for perpetual injunction to restrain the defendant and his successors in office from assessing certain of its railroad properties described as 'charter tax lines' from ad valorem taxation. Held:
>
> "Whether the petition be construed as one brought against the defendant in his official capacity or in his individual capacity, it was in substance and effect an action against the State and was not maintainable, the State not having consented to be thus sued. The court therefore erred in overruling the third ground of general demurrer presenting this contention. Other grounds of demurrer, whether general or special, should not have

been passed upon, and direction is given that ground 3 of the general demurrer be sustained and that the petition be thereupon dismissed, without any ruling or judgment as to other grounds, and without prejudice to either party or the State with respect thereto."

The foregoing involves identical issues as are involved in the present case. In the Wright case no issue was made as to whether it was an action against the State to which the State had not consented to be sued.

We respectfully suggest that this case is res judicata on the question as to whether the present action and also the action in the Wright case was one against the State to which the State had not given its consent to be sued.

*Plaintiff admits that the Musgrove or Redwine decision is Res judicata, in that it is a suit against the State.*

When the above case was pending in the United States Supreme Court on appeal plaintiff filed a motion to substitute the present defendant as party defendant in the place of Musgrove and prayed that in the event Mr. Redwine was not made a party that the court "reverse the judgment of said State Supreme Court erroneously holding that this is a suit against the State, and remand said suit to said State Supreme Court with direction that it order the Superior Court of Fulton County, Georgia, to dismiss said suit as moot,—*so that said judgment of said State Supreme Court, erroneously holding that this is a suit against the State, may not bar appellant from resisting any future effort on the part of said Charles D. Redwine, or any successor in office to him, as a wrongdoer would be held by said State Supreme Court likewise to be a suit against the State and not maintainable since such a suit would be in all essential respects identical with this suit.*" (Emphasis supplied)

If this judgment would be res judicata in the State courts, is it not entitled to the same respect in this court?

The United States Supreme Court rejected their request to prevent it from becoming res judicata, and hence deliberately made it res judicata.

## OF TWO CONFLICTING JUDGMENTS, THE LAST WILL PREVAIL

We have a situation where plaintiff, in 1907, obtained a judgment against William A. Wright, Comptroller-General, construing the alleged contract between it and the State of Georgia. Not satisfied with that judgment, this same plaintiff, in 1945, went into the State courts and sought another declaratory judgment on the same subject matter, the allegations in the two cases being almost identical. Plaintiff lost in the last case, and now it goes back to the Federal courts and seeks to obtain another judgment relative to the same subject matter. Defendant pleads the judgment in the State courts as res judicata.

> "The real question before the District Court in the instant case, therefore, was whether the judgment which worked as estoppel as to the value of the timber was the judgment of the Board of Tax Appeals or its own prior judgment. It is not doubted that the judgment of the Board could have been successfully relied on to establish the value of the timber in the first suit before the District Court. But the government, for reasons of its own, chose not to rely on it in that suit, and in our opinion thereby waived it, and cannot assert it in this case. Where there are two conflicting judgments, the last in point of time is the one which controls."
>
> *Donald vs. J. J. White Lumber Co.*, 68 F. (2d) 441, 442.

We also quote from

50 *C. J. S.* 597, as follows:

> "Waiver of, or Estoppel to Assert, Conclusiveness or Bar. A party who is entitled to claim the benefit of a

former judgment may waive, or be estopped to assert, the right.

"Although it has been said that, when a cause has been once fairly tried, it ought not to be tried aagin, even if the parties are willing, it is nevertheless a general rule that a party entitled to claim the benefit of a former judgment may waive or estop himself to assert such right. So, where a party is guilty of laches in setting up the defense of res judicata, or joins issue on the very questions settled by he judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it, or makes an admission of record inconsistent with the former judgment, he will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment has been rendered."

A strikingly similar case to the one at bar is found in that of

*Walkup vs. Covington*, 173 Tenn., 7.

Walkup filed action in the State courts asking for a homestead of $2000.00 to be set apart to him. Objections were filed ,and the case was left pending. Later, he was adjudicated bankrupt in the Federal courts and prayed for the same $2000.00 homestead. Only a $100.00 homestead was set apart to him in the Federal court. The Trustee in Bankruptcy attemped to dismiss the action still pending in the State courts. Walkup objected to this, and appealed this to the State Supreme Court of Tennessee. That court held:

"One may not abandon a court and a cause in which he has sought a given relief and voluntarily seek an adjudication of his right in another jurisdiction, and after having therein litigated to a conclusion on the issues, return to the court of original action and there seek to re-open and re-adjudicate the issues."

## THE PEOPLE OF GEORGIA HAD THE RIGHT TO REVOKE TAX EXEMPTIONS

There are three reasons why the people had the right to revoke any tax exemptions in adopting the Constitution of 1877 and 1945.

1. The right of sovereignty was reserved to the people by the Constitution of 1798.

2. Under the Fourteenth Amendment to the Federal Constitution, the State was under obligation to give its people the equal protection of the laws which were denied by the tax exemption clause of certain railroad corporation charters.

3. The plaintiff had violated its contract to construct the railroads provided by the charter.

Insofar as the first reason is concerned, as set forth in the amended answer and motion to dismiss, the people of the State of Georgia in the Constitution of 1798 reserved to themselves the sovereignty of the State. No legislature had the power to contract away in perpetuity any of the sovereignty, and when the people reasserted that right in revoking the exemptions heretofore granted by the legislature in the Constitution of 1877 and 1945, they were within their rights.

As for the second reason, *the Fourteenth Amendment, aimed against discrimination, is superior to the original provision of the Constitution which guaranteed the sanctity of contracts.*

In adopting the Constitution of Georgia, the people of Georgia had the inherent right to construe the Constitution of the United States, and where the enforcement of one of the laws guaranteed by the original Constitution was in conflict with a later amendment of the Constitution, the people

of Georgia had the right to repeal such a law and by doing so give to all the people of Georgia that qual protection of law guaranteed to them by the Fourteenth Amendment.

16 C. J. S. p. 89

> "While amendments are part of the Constitution, according to some cases, they are not regarded as if they had been parts of the original instruments, but are considered rather in the nature of codicils or second instruments, altering or rescinding the originals to the extent to which they are in conflict, and, in any event, they are to be treated as having a force superior to, and as superseding, their originals or other earlier provisions, to the extent of such conflict. . . ."

Under the foregoing we respectfully urge that the people of Georgia were well within their rights when they took the step for restoring their equal protection of the law and repealed this iniquitous discrimination, which throughout the life of this corporation has been so repugnant to the people, as well as the lawmakers, and has so outraged their sense of justice and equity. Especially were they justified in this when they considered that this corporation had already escaped more taxes than the capital stock or cost of building the railroad amounted to.

They also had the right to consider the fact that the enforcement of Section 15 denied to the school children of Georgia, and especially those counties and municipalities through which this railroad runs, the equality of the protection of and right to the same education that all of the other children are receiving because they were denied the tax funds the life blood which enabled the officials to support these schools, 15 mills being the limit which any county can levy to speak of all of the other benefits of government made possible by the taxing of all the other taxpayers which

this corporation was sharing and will share in perpetuity, yet bearing no part of the costs.

16 C. J. S., pp. 995, 996

(1) In General

Legislation may be limited in scope; and it may be adjusted to differences in things or situations; but it may not make any arbitrary or unreasonable distinction or discrimination; and, within the sphere of its operation, it must accord substantially equal and uniform treatment to all persons similarly situated.

State and municipal legislation is subject to the constitutional requirements that no state shall deny the equal protection of the laws to any person within its jurisdiction; and it is valid as complying with, or invalid as violating, this requirement accordingly as it does or does not, within the sphere of its operation, affect and treat alike, with equality and uniformity and without arbitrary or unreasonable distinction or discrimination, all persons similarly situated. . . ."

"38 . . . There is no distinction between the effect of privileges conferred and that of burdens imposed. Hill vs. Rae, 159, p. 826, 52 ont. 378, L. R. A. 1917A 495 . . .

A statute is invalid if individuals or corporations are singled out for the imposition of burdens or as beneficiaries.—Pauley vs. Keebler, 185 N. W. 554, 175 Wis. 428 . . .

A state may not grant a right to one which under similar circumstances is denied to another.—Dooley vs. Johnson, 24 P. 2d. 540, 133 Cal. App. 459."

Hillsborough Township vs. Cromwell, 326 U. S. 620, 90 L ed. 359.

"4. While a taxpayer may not complain of discriminatory treatment in violation of the Fourteenth Amendment by subjecting him to state taxes not imposed on

others of the same class if equality is achieved by increasing the same taxes of other members of the class to the level of his own, the constitutional requirement of equality is not satisfied if a states does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking the revision of the taxes of other members of the same class."

As for the third reason, *the corporation violated its contract.*

The people of Georgia had the additional right to revoke any exemption that might have been contained in Section 15 where the corporation failed to carry out its part of the contract and build the lines specified. *The sanctity of a contract is not guaranteed by the Federal Constitution where the complaining party has not complied with the condition imposed upon him by the contract.* Before plaintiff can show that the people of Georgia were violating the Constitution in revoking the exemption, it must allege and prove that it has carried out its obligations, and the petition failing to so allege, does not set out a cause of action. We quote from

51 C. J. pp. 463, 464, Sections 106 and 107, Railroads:

"106. b. Acceptance and Performance of Conditions.

(1) In General. In order that a railroad company may become entitled to aid granted to it by a state, county or other municipal corporation, and compel the collection of tax, the issue of bonds, or the like, as the case may be, it must at least substantially perform on its part all the conditions precedent on which the grant was made, unless the performance of such conditions has been waived, or is sufficiently excused; and the acceptance of a grant is an acceptance of all its terms and condition, so that the company is estopped from asserting that such terms of conditions are void and unreasonable. In determining whether conditions have

been complied with, the language used in the grant should be considered according to its ordinary and popular meaning, that is, as it would be understood by the voters or public generally. . . ."

"Conditions subsequent. Where a railroad company fails to perform fully conditions subsequent attached to a grant or acts in consideration of which the grant was made, the municipality granting the aid has a cause of action against the company on common-law principles to recover the money or bonds delivered to it, or the value of the aid."

(107) (2) Construction, Maintenance, and Operation of Railroads.—(a) In General. In accordance with the general rules relating to the performance of conditions attached to a grant of public aid, a railroad company's right to aid granted depends upon its performance of any conditions relative to the construction, maintenance, and equipment of the road, as that it shall be constructed between designated points or to or through a designated place, or that it shall be completed and put into operation. . . ."

*Plaintiff's Obligations Under Its Charter as a Contract*

If the State is bound by the Acts of the General Assembly creating plaintiff as a corporation, then the corporation is likewise bound to carry out the purposes for which is was created. Plaintiff cannot insist on the State being bound without itself being bound. Before plaintiff can demand that the State carry out its part of the contract, it must first allege that the corporation has complied with its part of it.

The Act of 1833 creating the Georgia Railroad Company made the following provisions relative to the roads to be constructed:

". . . That the company provided for in this act, and hereinafter more especially incorporated and authorized, shall

and may direct and confine their efforts and enterprise to the formation and completion of a railroad communication between the city of Augusta and some point in the interior of the state, to be agreed upon by the stockholders, which road shall be called the Union Rail Road;—and the same being completed, the company shall have power to construct three branch rail roads, beginning at the point agreed upon as the termination of the Union road, or such point for the middle road as the stockholders may select: One running to Athens —one to Eatonton—and the third to Madison, in Morgan county; which branches shall be erected simultaneously. . . . The company shall have the further power to continue the Athens branch towards any point which may be agreed upon, on the Tennessee River. . . .

The foregoing Act shows that in 1831 a charter had been granted another corporation to construct a railroad or canal from Augusta to Eatonton, but this charter was repealed in the Act of 1833 and these rights given to plaintiff. Under the 1831 Act Eatonton was entitled to a railroad. Clearly, it was the purpose of the legislature to require the new corporation to perform the duty imposed on the former corporation of constructing a line of communication from Augusta to Eatonton.

The Act of 1835 dissolving the Georgia Railroad Company and creating a new corporation in its stead made the following provisions which sets forth the purposes of its creation:

> "Sec. II. The stock of said company shall conist of two millions dollars . . . of which capital, one-half may be used for banking purposes, and not more until the completion of the road to Athens, and one of the southern branches through Greensboro, to be designated by a vote of the stockholders; at which time any capital stock unemployed may be used for banking purposes;

provided, however, that the continuation of said road beyond Athens, so as to connect with the Cincinnati road, shall be steadily prosecuted so soon as the company shall have satisfactory evidence that the said connection can be formed."

It will be noted that plaintiff does not even allege that it has built the roads provided in the charter. Failing to do that or failure to allege that it has thus carried out its obligations under its charter by building the roads, there is no cause of action set out.

The Trustees of Dartmouth College vs. Woodward, 4 U. S. Sup. Ct. 664, 671, 672.

". . . The obligation imposed upon them, and which forms the consideration of the grant, is that of acting up to the end or design for which they were created by their founder. Mr. Justice Buller, in the case of the King vs. Passamore says, that the grant of a corporation is a compact between the crown and a number of persons, the latter of which undertake, in consideration of the privilege bestowed, to exert themselves for the good government of the place. If they fail to perform their part of it, there is an end to the compact. . . ."

". . . A charter may be granted upon executory, as well as an executed or present consideration. When it is granted to persons who have not made application for it, until their acceptance thereof, the grant is yet in fieri. Upon the acceptance there is an implied contract on the part of the grantees, in consideration of the charter, that they will perform the duties, and exercise the authorities conferred by it. . . ."

In the case at bar, the citizens of Georgia who were to receive the benefits of the railroads to be constructed have been denied these roads by the failure of the corporation to construct them.

In the case of Southwestern and Central Railrod Co. vs. Collins, 40 Ga. 583, the court on page 624 says:

"Each charter of a private corporation is a contract first between the State and the Corporation to which each is so solemnly bound—the State that it will not impair the obligation—the corporation that it will perform the obligations of its incorporation and keep within the powers granted to it."

In the case of

Ordinary vs. Central Railroad and Banking Company,
40 Ga. 647

on page 652, 653 the court held:

"It is insisted that this is a contract between the State and the company, which forever exempts the company from a higher tax than one-half of one per centum on its net income, and that they are entitled to this perpetual exemption from taxation, no matter what may be the exigencies of the State or the burdens of taxation upon her people. If this be so, it is certainly but just to hold the company to such part of the contract as is favorable to the public."

Singleton vs. Southwestern Railroad
70 Ga. 464, 465.

"2. A corporation has only the power conferred upon it by its charter. Its grants of powers and exemptions are always to be strictly construed, and its obligations are to be strictly performed, whether they may be due to the state or to individuals. . . ."

## BREACH OF CONTRACT BY PLAINTIFF.

The following case is strikingly similar to the case at bar:

Bacon vs. Texas
163 U. S. 207, 16 Sup. Ct. 1023.

In this case the State of Texas passed a statute in 1879 authorizing the sale of unappropriated land for the State of Texas, but required that the purchasers should survey the lands and that the survey be made by the authorized public

surveyor of the county or district in which said land was situated. Bacon, et al, purchased 300,000 acres of this land and entered into possession of same, but failed to have the land surveyed as required and also failed to pay the purchase price until after the state legislature repealed the law although they offered to pay the amount before the case got into court. The State of Texas brought an ouster proceedings. The defendants pleaded impairment of obligation of the contract. The state pleaded failure on their part to perform as required by the statute. The Court of Civil Appeals of Texas held that there was no contract between the parties because of the failure of the defendants to have such survys made as were called for under the Act of 1879.

State vs. Morgan,
28 La. 490, 491.

". . . The charge that the State, in assessing the taxes now sought to be collected, has violated the obligation of her contract with the New Orleans, Opelousas and Great Western Railroad Company, cannot be maintained when the second section of the charter is read in the light of the facts disclosed in the record. . . ."

"The stipulation in the charter was, that the capital stock and other property of said company 'shall be exempt from taxation for ten years, after the completion of said road within the limits of this State.' *The consideration of the grant of this privilege was, of course, the promise of the corporation to prosecute to completion the work of building the railroad to the Sabine, or the Texas line.* (Italics supplied). No time was fixed for the completion of the work; but the understanding doubtless was that it should be completed within the time usually occupied in accomplishing such enterprises.

"Now what has the corporation done toward the completion of the road, and what is the prospect of its completion? Eighty miles were promptly completed, eighty-five miles beyond that have been partially graded, and

ninety-eight miles of the road remain untouched. This is all that has been accomplished since the charter was granted, in 1853, a period of over twenty years. Besides, there is no prospect of the completion of the road, no work having been done under the charter beyond Berwick's Bay since 1862, a period of over ten years. Over twenty years have passed, and the road has not been half completed. Over ten years have elapsed, and not a rod has been graded or a rail laid or a bridge built, or any work whatever done on the unfinished divisions of the road by the corporation or by Charles Morgan.

"In the face of such a palpable abandonment of the enterprise, and such a flagrant breach of contract, it is with bad grace that the charge is made by the defendant that the State, in making the assessment and demanding the taxes on the property described in this suit, is impairing the obligation of her contract. . . .

"How can he claim exemption from taxation for the property he acquired when it was conditioned upon the completion of the road, and that enterprise has been abandoned for years? Will a party who has wholly failed to give or perform the consideration of a contract be permitted to hold the opposite party to the obligation contracted as the equivalent of such consideration? . . ."

Pennsylvania College Cases
80 U. S. 553.

". . . Private charters, or such as are granted for the private benefit of the corporators, *are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified.* . . ."

The following cases from other states show that a corporation cannot demand its privileges granted in its charter when it fails to perform the acts for which it was created, nor can

it demand grants of aid where it fails to comple wit hits implied contract. In

Town of Henckley vs. Kettle River Railroad Co.
70 Minn. 105.

where the town voted a grant of aid to a railroad and after the company had received the grant and built the road it tore up and discontinued it, the court held that the consideration of the grant was not merely building the road but also the operating of it. Also see,

Ravenswood S. & G. Ry. Co. vs. Town of Ravenswood
41 W. Va. 732, 24 S. E. 597.

In the last case funds to buy stock with were voted by the town to aid in the construction of the railroad. After this was voted the route which had previously been fixed was changed. The court held that the original route was a part of the proposition and that when it was changed the company abandoned its right to the aid voted.

Long Island Water Supply Co. vs. City of Brooklyn
17 Sup Ct. 722.

". . . A charter is not simply an executed grant, but a continuing contract. *There is a duty of performance by the recipients of the grant which* continues during the life of the charter. . . . (Emphasis supplied)

*No Tax Exemption Provided by Act of* 1835 *Creating a New Corporation, the Georgia Railroad & Banking Company.*

The Act of 1835 created an entirely new corporation with all the powers necessary for it to function as such set forth in the Act, and whose name was changed to the Georgia Railroad & Banking Company.

In view of the fact that all statutes providing for a tax exemption must be construed most strongly against the tax-

payer and in favor of the State, it is of importance to determine whether the Act of 1835 created a new corporation or merely amended the charter of the Georgia Railroad Company. If an entirely new corporation was created, it would be necessary for the Act to specifically provide for the tax exemption. The provisions of the Act of 1835 are insufficient to transfer any stock or tax exemption from the Georgia Railroad Company to the Georgia Railroad & Banking Company.

*Section III of the Amending Act of* 1835 *Itself Calls the Georgia Railroad & Banking Company a New Corporation.*

An entirely different name was given the new corporation, new powers were given it, new corporators provided for. Unquestionably the Act granted to the new corporation all the powers necessary for a new corporation to carry out its purpose. A new corporation was created and the immunities granted to the Georgia Railroad Company *were not conveyed* to the Georgia Railroad and Banking Company.

A case in point is

*Atlantic and Gulf Railroad Company,*
*vs. State of Georgia,*
55 Ga. 512,

which was carried to the Supreme Court of the United States and was affirmed in the 98 U. S. 359. This case involved the question of whether a consolidation of two corporations resulted in the creation of a new corporation. The opinion in that case argues our point so effectively that we quote from the opinion in pages 361, 362 and 363:

". . . The 3rd Section continued in force the several immunities, franchises and privileges granted by the original charters and the amendments thereof, and the liabilities therein imposed, but plainly for the benefit

of the consolidated companies. *Why speak of original charters, if a later charter was not intended by the Act? That such was the intention appears still more clearly in 3d Section. That conferred upon the consolidated stockholders complete corporate powers. If granted to them, when consolidated, not only a corporate name, but the right under that name to acquire and hold property, to sue and be sued, to have a common seal, to make by-laws and generally to do everything that appertains to corporations of like character. This full grant of corporate power must have been intended for some purpose. What was it if not to create a corporation? For that purpose it was amply sufficient. For any other it was unmeaning.* If the two original companies were to continue in being, if it was not contemplated that they should be dissolved by consolidation, a new grant of corporate power and existence was unnecessary. They had it already." (Emphasis supplied).

The reasoning of the Georgia Supreme Court in

*The State vs. The Atlantic & Gulf Railroad Co.*,
60 Ga. 268,

follows this line of thought. We quote from the opinion on page 274:

"If the consolidated company had borne a different name from that of either of the original companies, it would probably have been recognized at once as a new creature. . . . .

". . . A case of vital succession, or new creation, occurs whenever the consolidated company is incorporated, no matter whether the powers conferred be those which were enjoyed by the prior companies under their respective charters, or powers altogether different. When the new corporate being comes into existence, it is without capacity to take by mere transmission from its predecessors; it can take only by grant, and the instrument of grant is its charter. . . ."

Another case in point is that of

*Snook vs. The Georgia Improvement Co.*
83 Ga. 61

We quote from page 68 of the opinion:

". . . We think that the Act of 1886 is not an amendment to the original charter of the Atlanta & Hawkinsville Railroad Company obtained under the general law, but is a separate, independent and distinct charter. The title to the act is 'An act to incorporate the Atlanta & Hawkinsville Raolroad Company, to confer certain powers and privileges on said company,t and for other purposes.' Acts 1886, p. 102. *The first Section of the Act then names the corporators; and they are not the same altogether as the corporators in the original Act. The act further says, after naming these persons, that 'they are hereby created a body politic and corporate, under the name', etc., and then proceeds to give them all the powers that are necessary for any railroad company whatever, the right to sue and be sued, to hold property, to condemn land, to mortgage; the amount of the capital stock is fixed, and the right given to join with other railroads; certain persons are appointed directors to act until a regular election can be held by the stockholders, etc., etc.* . . . The title to this amendatory act is as follows: 'An act to amend the charter of the Atlanta & Hawkinsville Railroad Company, to change the name thereof to the Atlanta & Florida Railroad Co., to authorize the extension thereof to the Florida line, and for other purposes.' The first section of that act recites that 'the name of the railroad corporation chartered heretofore by the act of this legislature, under the name of the Atlanta & Hawkinsville Railroad Company, be changed to the Atlanta & Florida Railroad Company.' The 6th section of the act says, that 'said railroad company shall have, in the construction of said extention, all the rights, powers, privileges and immunities granted to and conferred upon the Atlanta & Hawkinsville Railroad Company by the legislature of Georgia,

by act approved December 7th, 1886.' Construing these two acts together, and the phraseology of the acts, and the fact that the corporators in the original charter and those mentioned in the act of 1886 are not entirely the same, we conclude that these acts are not amendments to the charter granted under the general railroad law, but a separate and distinct charter granted by the legislature." . . . (Emphasis supplied)

The foregoing illustrations are strikingly similar to the case at bar and are conclusive that the Act of 1835 created a new corporation and that the Georgia Railroad & Banking Company was granted no tax immunity.

Section 20-115 of the Code of 1933 reads as follows:

"Novation.—One simple contract as to the same matter, and on no new consideration, does not destroy another between the same parties; but if new parties are introduced by novation, so as to change the person to whom the obligation is due, the original contract is at an end."

Here is no specific grant of tax immunity. A grant in the Act of 1833 of tax immunity to the Georgia Railway Company, is not a grant of tax immunity to the Georgia Railroad & Banking Company when created in 1835.

This is emphasized in the case at bar:

*Wright vs. Ga. Railroad & Banking Co.*,
216 U. S. 420, 54 L.ed. 544,

from which case we quote headnote (7):

"7. Incorporating a railway company with power to exercise all the powers and privileges conferred by an earlier act incorporating another railway company does not confer upon the new corporation the immunity from taxation enjoyed by the earlier company under its charter."

*Grant of Authority to Build Branch From Madison to Atlanta a Privilege, a Gratuity, and Not a Contract, Hence No Tax Immunity.*

It appears in the case at bar shows that the line from Madison to Atlanta is 67 miles long.

Even though plaintiff's tax exemption upon an alleged contract entered into between the State of Georgia and the Georgia Railroad & Banking Company should be established, the alleged contract did not provide for the construction of a railroad from Madison to Atlanta, but in 1837 the General Assembly passed an Act, the material portions being:

". . . And whereas, in pursuance of the views of said Act, (relative to the building of the State road), the Monroe Rail Road Company, and the Chattahoochee Rail Road Companies, have obtained the privilege, by acts of the Legislature, to connect their respective roads wtih said State Rail Road.

"SECTION 1. . . . That the said Georgia Rail Road and Banking Company, shall have the right, and they are hereby authorized and empowered to continue their railroad from the town of Madison, in Morgan County, to pass through or near Covington, in the County of Newton, to connect with and join the Rail Road, about to be constructed by the State, from the Tennessee line, near the Chattahoochee river, as contemplated by the Act recited in the foregoing preamble, and for that purpose the said Georgia Rail Road and Banking Company, shall have all the powers and privileges, rights and immunities in the construction of said branch from Madison, as aforesaid, to the said State Rail Road, as are contained in the several Acts heretofore passed, and now of force, constituting the charter of the Georgia Rail Road and Banking Company, as fully as if the said continuation had been originally a part of the Georgia Rail Road; and the said Acts shall extend to, and regulate the construction of said extended Road, hereby au-

> thorized to be constructed, in the same manner, and to the same extent and for the same purpose and uses, as the same have been used and applied to the Georgia Rail Road and its branch from the City of Augusta to the said town of Madison." . . .

Attention is especially called to the fact that the "Powers, and privileges, rights and immunities" are allowed to the Georgia Rail Road and Banking Company only "in the construction of said branch." Applying the rule of strict construction to this alleged grant of immunity from taxation, and considering that the construction of the road was completed long years since (about 1845), it is readily seen that such an immunity would not today serve to exempt this part of said road from taxation at the rate now prescribed for other Railroads. Such immunity as the Railroad enjoyed by virtue of this statute most definitely ended when the construction was completed.

The immunity "in the construction" could not have referred to perpetual immunity from taxation but referred to the immunity from injunction in the road which previous acts had specifically granted to the corporation.

This Act was not granted for the purpose of benefiting the State, but was granted as a privilege for the benefit solely of the corporation. It was a gift, a gratuity; it was a privilege that the corporation itself was seeking.

This court will take judicial cognizance of the fact that the State was building what was called the State Road leading from what is now Atlanta to Chattanooga, connecting with other Railroads leading to the North and West, opening up a vast reservoir from which freight must be shipped to the Atlantic Coast. The court will also take judicial cognizance of the fact that there was a line of Railroads provided by the General Assembly running from Atlanta to Macon,

and still another from Macon to Savannah, furnishing direct communication with the Coast.

It was a matter of utmost necessity that the Georgia Railroad be connected with this State Road. For to do so meant that it would be able to share in all this vast amount of freight destined for Augusta, the head of navigation on the Savannah River and into the Carolinas, to the port of Charleston, and on to other ports up the Coast of the United States cut off from the West by the Appalachian Mountain chain.

Therefore, the corporation sought and received these benefits from the State, not as a part of the contract for which it would give value received, but as free gifts. If the privilege provided in the Acts of 1837 be a gift from the State to the corporation then, it is not a contract but is subject to be retaken at the will of the General Assembly.

This issue was made in the case of

*Goldsmith vs. Georgia Railroad Company,*
62 Ga. 485,

in which case the issue was raised by demurrer and the demurrer overruled by the lower court. But the case was reversed by the Supreme Court of Georgia on other grounds. We contend that this portion of the road is without any tax exemptions, even though the remainder of it should be exempt.

*The Amending Act of 1837 Was Not a Contract.*

The corporation made no agreements to build the road in question, nor to maintain it after it was built. There was absolutely no consideration for the grant of the privileges set out in the Act.

It will be noted that the Act of 1837 was an amendment to the Act creating the corporation.

The case of Southwestern Railroad Company vs. Wright, 116 U. S. 231, a case involving an amendment of an Act which had an exemption similar to that in the within case clearly brings out this issue: From this we quote:

> "The language of the authority to build the road from Cuthbert to Eufaula is somewhat different. There nothing is said about taxation, but that the original charter of the company did not give the right to build this part of the road is shown by the fact that this amendment was deemed necessary. In building this extension or branch the company was placed 'under the rules and restrictions' they were subjected to in building the original road; but that did not necessarily imply an exemption of this line from taxation to the same extent the old road was. That exemption was only for that road, and as the amending act does not in terms or by fair implication apply the exemption to the additional road which was to be built under it, we must presume that nothing of the kind was intended, and that the state was left free to tax that road like other property. No rule is better settled than that a contract of exemption from taxation is never to be presumed. A surrender of the power to tax when claimed 'must be shown by clear and unambiguous language which will admit of no reasonable construction consistent with the reservation of the power.' Delaware Railroad Tax Case, 18 Wall. 207."

Again in the case of Wells vs. Mayor, etc. of Savannah, 181, U. S. 531, 21 S. Ct. 697, certain city lots under the ordinance of 1790 had been exempt from taxation for 100 years. The attack upon the exemption was carried to the United States Supreme Court.

> "The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such pay-

ment, and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist. This has been many times decided by this court."

Other cases where the United States Supreme Court has construed acts of the General Assembly of the several states creating corporations or granting exemptions are as follows:

*The West Wisconsin Railway Company, Plaintiff in error, vs. The Board of Supervisors of the County of Trempealeau,*

23 S. Ct. 814, 815.

"1. An exemption from state taxation, which is a mere gratuity, may be withdrawn whenever the State thinks it best for the public welfare.

"2. A reasonable doubt, as to whether an exemption claimed amounts to a contract, is fatal to the claim. Prima facie, every presumption is against it."

*Vicksburg, S. & P. R. Co. vs. Dennis, Sheriff, etc.,*
6 Supreme Reporter, page 625.

". . . In determining whether a statute of a state impairs the obligation of a contract, the Supreme Court must decide for itself the existence, and effect of the original contract, (although in the form of a statute), as well as whether its obligation has been impaired.

". . . The omission of the taxing officers of a state to assess, in previous years, certain property cannot control the duty imposed by law upon their successors, or

the power of the legislature, or the legal construction of the statute under which the exemption is claimed."

*Tucker vs. Ferguson*, 89 U. S. 816.

". . . The provision of the 37th section of the Act of 1871, exempting the lands specified from local taxation until three years from the first of April 1871, which period has not elapsed, was not a contract. There was no consideration. The company was required to do nothing and did nothing in return. As between individuals the stipulation would belong to the category of nude pacts. It has no higher character because one of the parties was a State, the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity spontaneously made, which might be kept, changed or recalled at pleasure."

*The legislature had no power to contract away the sovereignty of the State.*

It has been thus in Georgia since the Constitution of 1798 declared that the territory and "jurisdictional rights" of Georgia

"is now of right the property of the free citizens of this State, and held by them in sovereignty, inalienable but by their consent."

and forbade the Legislature as follows:

"to which territory such power of contract or sale, by the legislature, shall not extend."

This was forcefully stated in the opinion of Judge Nicoll in the case of

The State, etc., vs. Dews, R. M. Charlton 397, decided at the January term, 1835, in which case a public official insisted that he had a property right to an office. We quote from the opinion of the court relative to public officers on page 401:

*"As public agents, they are intrusted with the exercise of a portion of the sovereignty of the people—the jus publicum, which is not the subject of grant, and can be neither alienated nor annihilated, and it would be a repugnant absurdity, as incomprehensible as it would be revolting that they can have a private property in that sovereignty."* (Italics supplied.)

Again, from page 414, we quote:

"Indeed with how much more force may it not be objected to such a proposition, that it is not adequate to the Legislature to grant to an officer privileges which impair or interfere with the powers necessarily and inseparably appertaining to the sovereign legislative power of the State, since it would violate the fundamental compact, the compact of the Constitution?"

This question arose in the case of

Hamrick vs. Rouse, 17 Ga. 56.

We quote from the opinion of Judge Starnes on page 60:

". . . it is very certain that no Legislature has the right to bind all subsequent Legislatures, all posterity, as to any matter of mere political arrangement or expediency. The good faith of the State, or its people, under some circumstances, in a moral point of view, might become very decidedly pledged by the Legislature to such political arrangement; but still, as matter of contract, the Legislature could not bind posterity upon a subject of mere political expediency."

Again in the case of

Bailey vs. The State, 20 Ga. 742.

We quote from the opinion of Judge Benning on page 744:

"No legislature has a power to curtail or to contract the power of a subsequent legislature."

The next case involving this question was that of

Daly vs. Harris, 33 Ga. Supp. 38.

We quote from pages 50 and 51:

"Again, it is true of all governments invested with legislative power for the common weal, that no Legislature can, by contract, divest either itself or its successors of any power necessary to the well-being of the State. The Presbyterian Church vs. The Mayor and Council of New York, 5 Cowen, 538; Gosler vs. Georgetown, 6 Wheaton, 593; Ohio Loan, Insurance and Trust Company vs. Debolt, 16 Howard, 431; (opinions of Chief Justice Taney and Mr. Justice Campbell). Hamrick vs. Rouse, 17 Georgia, 59, 60; Bailey vs. The State, 20 ibid. 744. Governments have, in themselves, no rights to be secured or interests to be protected. They are mere agencies established for the security of rights and the promotion of interests appertaining to the founders, who, by common consent, have become the governed. To this end, they have been invested with certain necessary powers, the exercise of which devolves upon different individuals, who, in the course of time, come successively into the government. If the depository of those powers for the passing hour, may alien any one of them, so as to deny itself and its successor the exercise of it, all of the others may be so aliened, and the result would follow, that an agency established by society for certain specified ends, may in its discretion, defeat those very ends, which would be contrary to first principles, and subversive of all government."

We have been unable to find any variation from this line of decisions until 1875 when in the case of the State vs. Georgia Railroad and Banking Company, 54 Ga. 423, wherein no Georgia constitutional question was raised, Judge McCay wrote an opinion completely at variance with all the foregoing precedents established by the Supreme Court of Georgia.

This decision was made without considering the Georgia Constitution. Counsel for the State did not raise the question as to whether this provision of the Act was unconstitutional as measured by the Constitution of the State of Georgia. This is

brought out by the record of the case which shows that Attorney General Hammond and Attorney Robert Toombs raised no constitutional questions in either the superior court or in the bill of exceptions to the Supreme Court. This being the case, what the court had to say about the powers of the General Assembly to enact such laws is mere obiter dicta.

*Plaintiff Has Ample Remedies at Law in Which to Test Its Rights Under the Charter, To-Wit:*

1. *Arbitration ad appeal on valuation assessment.*
2. *Appeal from the order levying the taxes.*
3. *Affidavit of illegality.*
4. *Payment of taxes due State and suit for refund.*

1. Appeals:

It will be noted that the State Revenue Commissioner is required to take two steps relative to taxes of railroads. First, he must assess the valuation of the property of the railroad company which assessment of valuation is subject to arbitration and appeal to a jury in the Superior Court. (Code Section 92-8426 (e). Second, when the valuation is fixed, then he must assess or levy the taxes. This order levying the taxes is subject to appeal to the Superior Court in which every defense plaintiff might have could be determined by the court. (Code Section 92-8426 (d) ).

2. Affidavit of Illegality:

Under the Act of 1943, pp. 204, 206, it is specifically provided that "all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review" in the Superior Court. We quote the following from the same Act:

> "Provided, however, that nothing herein contained and no provision of this law (Sections 92-8426 (d) to 92-8426 (f) shall be construed to deprive a taxpayer

against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality."

3. Suit for Refund;

Insofar as the taxes collected by the State are concerned, Code Section 92-8435 provides for suit against the Commissioner of Revenue for any taxes illegally collected. In such suit all reasons why the taxes were illegal can be litigated.

We thus see that the State has provided plaintiff four separate and distinct methods in its own courts wherein litigation between plaintiff and the State is authorized, in three of which all of plaintiff's contentions can be pleaded.

*The State Can Forbid Injunctions to Its Own Courts*

When the State provides means through which persons aggrieved can have ample redress through legal actions, it can forbid the use of injunctions. The State, having provided these remedies, has denied to its taxpayers any other means of litigating with it.

Code Section 92-8445 specifically forbids injunction in such cases as follows:

"Appeal from Commissioner's findings; petition; supersedeas; evidence; decision.—The Commissioner's assessment shall not be reviewed except by the procedure hereinafter provided. No trial court shall have jurisdiction of proceedings to question such assessments, except as in this Chapter provided."

The foregoing was construed in *Forrester, Rev. Com'r. vs. Pullman Co.*, 66 Ga. App. 745.

"The method of reviewing the tax assessment of the Commissioner of Revenue is prescribed by our Code, 92-8446, and procedure therein is exclusive, and no trial court shall have jurisdiction of proceedings to

question such assessments, except as in this chapter provided."

In the case of.

*Whiddon vs. State Revenue Commission,*
184 Ga. 453, 191 S.E. 438

the court held that the plaintiff had an adequate remedy at law by interposing the affidavit of illegality on the levy of the execution and that an injunction should not issue to restrain the enforcement of the execution, on the grounds that plaintiff was exempt from the taxes levied.

Wherefore,

Intervenors respectfully pray that this court examine carefully the iniquitous tax exemption claimed by Appellant and hold that it is void, because:

1. It denies to all the people of Georgia, the equal protection of the laws as guaranteed by the 14th Amendment.

2. The people of Georgia had the right to adopt the Constitution of 1945, abolishing all such exemptions.

3. That the Appellant lost any exemption it might have had when it failed to carry out its contract and build the railroads specified by the charter.

4. That the charter of the Georgia Railroad and Banking Company of 1835 did not contain any tax exemption.

5. That the branch of the railroad from Madison to Atlanta has never been granted any tax exemption.

And that by reason of these holdings by the United States Supreme Court the judgment of the court below should be sustained.

Respectfully submitted, by the following Counties and municipalities:

Signed

Victor Davidson, Irwinton, Ga.
Special Attorney for Intervenors.

| | |
|---|---|
| MORGAN COUNTY<br>OGLETHORPE COUNTY<br>GREEN ECOUNTY<br>CITY OF GREENSBORO<br>CITY OF UNION POINT | Jos. G. Faust, Attorney<br>Greensboro, Ga. |
| WARREN COUNTY | Joe H. Terrell, County Attorney<br>Warrenton, Ga. |
| CLARKE COUNTY | Carlisle Cobb, County Attorney<br>Athens, Ga. |
| McDUFFIE COUNTY | J. Glenn Stovall, County Attorney<br>Thomson, Ga. |
| NEWTON COUNTY | C. C. King, County Attorney<br>Covington, Ga. |
| FULTON COUNTY | Standish Thompson, Attorney<br>Atlanta, Ga. |
| ROCKDALE COUNTY | J. H. McCalla, Dempsey W. Leach,<br>Attorneys, Conyers, Ga |
| WALTON COUNTY | Roberts and Roberts, Attorneys<br>Monroe, Ga |
| DeKALB COUNTY | Julius A. McCurdy, County Attorney<br>Decatur, Ga |
| TOWN OF RUTLEDGE | A. F. Jenkins, Attorney<br>Madison, Ga. |
| TALIAFERRO COUNTY | Osgood O. Williams,<br>County Attorney, Crawfordville, Ga. |

| | |
|---|---|
| BURKE COUNTY. | E. M. Price, County Attorney<br>Waynesboro, Ga |
| CITY OF MADISON,<br>COLUMBIA COUNTY | J. F. Hardin, County Attorney<br>Augusta, Ga. |
| TALBOT COUNTY | J. A. Smith, Attorney<br>Atlanta, Ga. |
| CITY OF MACON | Ed Sells, City Attorney<br>Macon, Ga. |
| TAYLOR COUNTY<br>CITY OF REYNOLDS<br>CITY OF BUTLER | J. R. Lunsford, Attorney<br>Butler, Ga. |
| PEACH COUNTY<br>PEACH COUNTY<br>BOARD OF EDUCATION<br>CRAWFORD COUNTY | Sam M. Matthews, Attorney<br>Ft. Valley, Ga. |

I, Victor Davidson, Special Attorney for Intervenors, Amici Curiae, certify that I have this day served a copy of the within brief on Hon. Eugene Cook, Attorney General of Georgia, Counsel for Appellee, and on Hon. Robert B. Troutman, Hon. Furman Smith, and Spalding, Sibley, Troutman & Kelly, Counsel for Appellant, by mailing copies of same to their addresses.

This.....day of January, 1950.

Victor Davidson
Special Counsel for Intervenors,
Amici Curiae